Filed 2/14/11 In re Jason D. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JASON D., a Person Coming Under the Juvenile Court Law.	H035674 (Santa Clara County Super. Ct. No. JV36454)
THE PEOPLE, Plaintiff and Respondent, v. JASON D., Defendant and Appellant.	

The Santa Clara District Attorney filed a petition pursuant to Welfare and Institutions Code section 602 alleging that appellant Jason D. made criminal threats (Pen. Code, § 422 - count 1) and committed a battery (Pen. Code, §§ 242, 243, subd. (a) - count 2). Following a contested hearing, the juvenile court sustained both counts, declared appellant a ward of the court, and placed him on probation. On appeal, appellant contends: (1) there was insufficient evidence to support the juvenile court's finding on count 1; (2) he was deprived of the effective assistance of counsel; (3) remand is required because the juvenile court failed to declare whether the criminal threat was a misdemeanor or a felony; and (4) the search and seizure conditions are unconstitutionally

overbroad. We remand the matter for the juvenile court to exercise its discretion to declare the criminal threats offense to be either a misdemeanor or a felony.[1]

I. Statement of Facts

In October 2009, Jonathan M. was a freshman at Independence High School where he attended some classes with appellant. According to Jonathan, appellant "knocked [him] out of [his] chair at [his] desk and like punched [him] for the past year." Jonathan hit his head on the wall during one of these incidents. Appellant was suspended from school for this conduct. On October 20, 2009, the police issued a citation to appellant for committing a battery on Jonathan.

Appellant and Jonathan had also gotten into "yelling matches" at school "pretty much like every day." Jonathan explained, "I haven't really yelled anything to offend him, just when he yelled at me I just yelled back." Jonathan tried to ignore appellant. On one occasion, Jonathan tripped appellant "by mistake" as they were both walking by a desk. Jonathan had never seen appellant with a weapon at school.

On October 30, 2009, appellant and Jonathan were walking to class when appellant said, "'I'm going to kill you, I don't care if I do it in front of a teacher.'" Jonathan was afraid that appellant might "actually carry it out" and "do some serious harm" to him. There were no teachers present. Appellant gave Jonathan a "dirty look" and continued staring at Jonathan as he walked away. Appellant did not follow Jonathan. While they were in their first class together, appellant did not speak to Jonathan. Appellant then made the same threat between their classes. During their second class together, appellant argued and yelled at Jonathan and Jonathan tried to ignore him. Jonathan reported the threats to Donald Alvarado after these classes, which lasted two

[1] Appellant has also filed a petition for writ of habeas corpus, which we have considered with this appeal. We dispose of his habeas corpus petition by separate order.

hours. He decided to stay in Alvarado's office for the rest of the day, because he was afraid that appellant was going to kill him if he was out in public.

Alvarado, the discipline advisor at Independence High School, testified that after Jonathan reported that appellant had threatened him, he notified the police. Alvarado described Jonathan as "shaken up" by appellant's threat. Alvarado stated that Jonathan remained in his office until appellant was taken into custody, but he did not recall whether Jonathan returned to class that day.

Alvarado also testified that he had spoken to Jonathan and appellant on October 27 about appellant "perhaps having some boys chasing Jonathan around." Appellant was suspended for two days for this incident. Alvarado stated that appellant's "friends had said that they were doing that for" appellant.

During his investigation of the October 30 incident, appellant told Alvarado that Jonathan had made "bullying type statements toward him." According to Alvarado, there were incidents in which Jonathan threatened other students, and Jonathan was found with a knife on campus. Alvarado also testified that there were a couple of incidents in which "maybe [Jonathan] was not truthful." Jonathan was also cited for fighting on campus.

II. Discussion

A. Sufficiency of Evidence

Appellant contends that there was insufficient evidence to support the juvenile court's finding on count 1.

In considering a sufficiency of the evidence claim in juvenile delinquency proceedings, this court applies the same standard of review that is applicable in criminal cases. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) Thus, this court must "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible,

and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

To prove a criminal threat (Pen. Code, § 422), "the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Appellant argues that there was insufficient evidence to support the third element of the statute, that is, that "the threat be 'so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution.'"

"[T]he determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances. [Citations.]" (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340-1341, superseded on another point by statute as stated in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1442.) Other circumstances that may satisfy this element include:

erratic behavior (*People v. Jackson* (2009) 178 Cal.App.4th 590, 600); threatening gestures (See *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348); commission of a battery (*People v. Butler* (2000) 85 Cal.App.4th 745, 754); display, use, or threatened use of a weapon (*People v. Fierro*, *supra*, 180 Cal.App.4th at pp. 1346-1347); and gang connection (*People v. Mendoza*, *supra*, 59 Cal.App.4th at p. 1341.)

Here, the parties' history conveyed a gravity of purpose to appellant's statements. Appellant had previously physically and verbally abused Jonathan. Ten days before the present incident, the police cited appellant for committing a battery on Jonathan after appellant knocked Jonathan out of his chair causing him to hit his head. When appellant returned to school after his suspension, he stated to Jonathan both prior to and between classes, "'I'm going to kill you. I don't care if I do it in front of a teacher.'" These threats were not ambiguous. Jonathan was "scared" and afraid that appellant would harm him. He reported the incident to Alvarado after class and then spent the rest of the day in Alvarado's office because he was afraid that appellant would kill him if he appeared in public. According to Alvarado, Jonathan appeared to be "shaken up" by appellant's threat. Thus, there was substantial evidence to support the juvenile court's finding that appellant made criminal threats.

Appellant argues that their "history was not sufficiently violent, extensive, or similar to make a threat about killing grave and immediate." He relies on several cases involving domestic violence. (*People v. Garrett* (1994) 30 Cal.App.4th 962, 965 [defendant threatened to "'put a bullet'" in the victim's head after he had beaten her on numerous occasions, had a prior conviction for shooting a man, and had recently obtained a gun that was stored in their apartment]; *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1427-1429 [defendant told victim that he had pistol-whipped a former girlfriend, physically abused the victim, stole her gun and jewelry, slashed her belongings, chased her, put his fist through her car window, and tried to stop her from leaving]; and *People v. Smith* (2009) 178 Cal.App.4th 475, 480-481 [defendant had 19-year history of escalating

violence, including beatings so severe they required brain surgery and involved the death of a fetus, repeatedly placing a gun in her mouth, sexual abuse, threats of mutilation in front of the couple's children, and torturing and killing the family pets].)

While the present case does not involve the violence displayed in *Garrett*, *Gaut*, and *Smith*, we are not persuaded that "what the evidence showed is boys, albeit rowdy ones, being boys." Appellant had "been punching [Jonathan], knocking [him] out of [his] chair for the past year." Appellant also verbally abused Jonathan. This campaign of physical and verbal abuse was sufficient to make his threat grave and immediate.

Appellant also argues that Jonathan failed to "'take immediate action'" in response to the threats. We disagree. Here, after appellant threatened to kill him, Jonathan went to class but did not report the threat to the teacher. Given that others were present in the class, one can reasonably infer that Jonathan felt that appellant would not carry out his threat. However, as soon as the class was over, Jonathan reported the threats to the discipline advisor. He then decided to stay in the school office for the rest of the day because he was afraid that appellant was going to kill him if he appeared in public. Thus, Jonathan responded in a manner that indicated he believed the threats were grave and immediate.

Appellant also relies on *In re George T.* (2004) 33 Cal.4th 620 (*George T.*), *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*), and *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*). However, these cases are factually distinguishable.

In *George T.*, the minor gave three other students a poem, which stated in relevant part, "'I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!'" (*George T.*, *supra*, 33 Cal.4th at p. 624.) One student read the poem, became frightened, and left campus. (*Id.* at p. 625.) Another student did not find the poem threatening, while the third student, who only read it after the matter was brought to the attention of the vice-principal, believed it was a threat on

her life. (*Id.* at pp. 627-628.) The California Supreme Court concluded that the statements were ambiguous, stating that "exactly what the poem means is open to varying interpretations because a poem may mean different things to different readers. As a medium of expression, a poem is inherently ambiguous. In general, '[r]easonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are,' which means they 'are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory.' [Citation.]" (*Id.* at pp. 636-637.) The court also focused on the lack of evidence of prior conflicts between the minor and the other students. "Unlike some cases that have turned on an examination of the surrounding circumstances given a communication's vagueness, incriminating circumstances in this case are noticeably lacking: there was no history of animosity or conflict between the students . . . ." (*Id.* at p. 637.) Here, in contrast to *George T.*, appellant's threat to kill Jonathan was direct and unequivocal and appellant had a history of physical and verbal abuse of Jonathan.

In *Ryan D., supra,* 100 Cal.App.4th 854, the minor turned in a painting for a school art project. (*Id.* at p. 857.) The painting depicted the minor shooting a police officer, who had cited him for drug possession a month earlier. (*Ibid.*) When the painting was shown to the officer, she was concerned for her safety. (*Ibid.*) The Court of Appeal observed that the painting was ambiguous as a threat since it was not accompanied by any words, gestures, or facial expressions to the officer. (*Id.* at p. 864.) The court also noted that the painting did not "appear to be anything other than pictorial ranting" because neither the school authorities nor the police believed the painting was an immediate threat. (*Id.* at pp. 864-865.) In contrast to *Ryan D.*, here, appellant directly threatened Jonathan, and after Jonathan reported the threats, Alvarado contacted the police who arrested appellant that same day.

In *Ricky T., supra,* 87 Cal.App.4th 1132, the minor left the classroom to use the restroom, and found that the door was locked when he returned. (*Id.* at p. 1135.) After

the minor pounded on the door, the teacher opened the door and accidently hit the minor. The minor then cursed and threatened the teacher, stating "'I'm going to get you.'" (*Ibid.*) The teacher felt threatened and sent the minor to the school office. (*Ibid.*) The Court of Appeal noted that the statement was "ambiguous on its face and no more than a vague threat of retaliation," and that there was nothing in the record indicating that the parties "had any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other." (*Id.* at p. 1138.) Unlike in *Ricky T.*, as previously stated, appellant's threat was not ambiguous and appellant had an extensive history of physically and verbally abusing Jonathan.

Appellant next argues that there was insufficient evidence to meet the fifth element of a criminal threat, that is, that the victim's fear was reasonable under the circumstances. When asked if appellant threatened to kill him, Jonathan responded, "He says stuff like that. I don't know if he was really serious about it, but I was threatened by it." Relying on this testimony, appellant claims that Jonathan did not take the threat seriously. However, Jonathan testified that he was scared that appellant might carry out the threat and was afraid of being hurt. He also testified that he stayed in the school office because he believed that appellant would kill him if he appeared in public. To the extent that there were any inconsistencies in Jonathan's testimony, the trier of fact was "entitled to reject some portions of a witness' testimony while accepting others." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Applying the same analysis that he used in challenging the sufficiency of the evidence to support the third element of a criminal threat, appellant also contends that "the evidence of 'the circumstances' here was not sufficient to support a finding of reasonable, sustained fear." He asserts that he did not engage in erratic behavior, make threatening gestures, commit a battery, display, use, or threaten use of a weapon, or have a connection to a gang. As previously discussed, Jonathan's fear was reasonable under the circumstances based on the parties' history.

In sum, there was substantial evidence to support the juvenile court's finding that appellant made a criminal threat.

B. Ineffective Assistance of Counsel

Appellant asserts that "the out-of-court statement by 'friends' of [appellant] that they had chased [Jonathan] 'for him' . . . was hearsay, which was inadmissible under the Evidence Code; state and federal due process protections; and the confrontation rights guaranteed by the U.S. and California Constitutions." He further argues that reversal is required because trial counsel rendered ineffective assistance for failing to object to this statement.

In order to prevail on a claim of ineffective assistance of counsel, appellant must show that "counsel's representation fell below an objective standard of reasonableness under prevailing professional norms," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.)

Here, even assuming that trial counsel's representation was deficient, appellant has failed to demonstrate prejudice. Evidence that appellant's friends chased Jonathan was cumulative of the undisputed evidence that appellant verbally and physically abused Jonathan. Thus, it is not reasonably probable that the result would have been different if this evidence had been excluded.

C. Failure to Exercise Discretion

Appellant next contends, and the People agree, that the matter must be remanded for the juvenile court to exercise its discretion to determine whether the criminal threat offense was a felony or a misdemeanor.

Welfare and Institutions Code section 702 provides in relevant part: "If the minor is found to have committed an offense which would in the case of an adult be punishable

alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." Making criminal threats is punishable either as a misdemeanor or a felony. (Pen. Code, § 422.) Here, since the juvenile court failed to exercise its discretion, we remand the matter for further proceedings.

D. Search and Seizure Probation Conditions

Appellant also argues that the probation conditions requiring him to submit to searches and seizures must be stricken because they are unconstitutionally overbroad.[2] Since he failed to object to these conditions at the dispositional hearing, he has forfeited the issue.

Courts will generally uphold a probation condition unless it "'(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .'" (*People v. Lent* (1975) 15 Cal.3d 481, 486, superseded on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292.) However, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).)

The doctrine of forfeiture applies if the contention involves an unreasonable probation condition "premised upon the facts and the circumstances of the individual case." (*Sheena K.*, *supra*, 40 Cal.4th at 885, 889.) This doctrine does not apply,

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[2] Condition No. 13 states: "That said minor submit his person, property, residence, or any vehicle owned by said minor or under said minor's control, to search and seizure at any time of the day or night by any peace officer with or without warrant." Condition No. 14 states: "That said minor submit his person, property, or any vehicle owned by said minor or under said minor's control, to search and seizure by school officials while on school campus or during school events."

however, when the contention involves a facial challenge to the probation condition on the grounds of vagueness or overbreadth that raises a pure question of law. (*Id.* at p. 887.)

Here, appellant is not arguing that the probation conditions are facially unconstitutional. Instead, he argues that they are unrelated to the facts of this case and were not adequately tailored to the purposes of probation in his case. Thus, in referring to the particular sentencing record in the present case, appellant's argument does not raise a pure question of law. Since he failed to object to the probation conditions at the dispositional hearing, he has forfeited the claim on appeal.

Appellant's reliance on *In re Spencer S.* (2009) 176 Cal.App.4th 1315, *In re Victor L.* (2010) 182 Cal.App.4th 902, and *In re E.O.* (2010) 188 Cal.App.4th 1149 is misplaced. In contrast to the present case, those cases involved pure questions of law. (*In re Spenser S.*, at pp. 1329-1330; *In re Victor L.*, at p. 909; *In re E.O.*, at p. 1153, fn. 1.)

III. Disposition

The order is reversed. On remand, the juvenile court shall exercise its discretion to declare the criminal threats offense to be either a misdemeanor or a felony.

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Mihara, Acting P. J.

WE CONCUR:

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McAdams, J.

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Duffy, J.